The jury found petitioner guilty on all five counts. The district court sentenced him to a prison term of life plus five years. Gov't C.A. Br. 4-5.

6. Petitioner raised a number of claims on appeal, including a challenge to the admission of Lopez's out-of-court identification. The court of appeals affirmed, rejecting one of petitioner's claims in a published opinion and his remaining claims, including his challenge to the admission of the identification, in an unpublished summary order. Pet. App. 1a-6a, 7a-10a. The court rejected petitioner's identification claim in a single paragraph. *Id.* at 10a. It noted that the district court had "conducted a multi-day Wade hearing" and had "reasonably determined that though the procedures used in obtaining the identification of [petitioner] were suggestive, the identification by one of his co-conspirators was itself reliable." *Ibid.* "Based on the district court's analysis," the court of appeals concluded, "there was no clear error" in the admission of Lopez's identification. *Ibid.*

## ARGUMENT

In *Neil* v. *Biggers*, 409 U.S. 188 (1972), and again in *Manson* v. *Brathwaite*, 432 U.S. 98 (1977), this Court considered when due process requires the exclusion of identification evidence following an out-of-court identification. Under those decisions, if the identification procedure was not unduly suggestive, the identification is admissible without further inquiry, and if the procedure *was* unduly suggestive, the identification is admissible as long as the identification is independently reliable. 432 U.S. at 107-117; 409 U.S. at 196-201. In both *Biggers* and *Brathwaite*, the Court listed factors to be considered in determining whether, despite an unduly suggestive procedure, the identification was reliable.

432 U.S. at 114; 409 U.S. at 199-200. One of those factors is the level of certainty of the witness. 432 U.S. at 114; 409 U.S. at 199. Relying on scientific studies addressing the correlation between a witness's certainty and the accuracy of the identification, petitioner contends (Pet. 3-20) that witness certainty should be removed from the list of factors to be considered.

Certiorari should be denied. First, the scientific evidence is not one-sided, and certainly is not sufficiently one-sided to justify overruling *Biggers* and *Brathwaite* in part. Second, despite petitioner's claim that the empirical foundations of *Biggers* and *Brathwaite* have washed away, no division of authority has emerged in the lower courts on whether the rule petitioner advocates is required by federal due process. Third, petitioner's claim was not adequately presented to, and was not passed upon by, the court of appeals. Finally, this case is also an unsuitable vehicle for deciding the question presented because adoption of petitioner's rule would have no effect on the outcome.

1. Petitioner does not challenge the applicable constitutional standard, which is "whether under the 'totality of the circumstances' the identification was reliable even though the [identification] procedure was suggestive." *Biggers*, 409 U.S. at 199. On the contrary, he acknowledges (Pet. 4) that "reliability is the linchpin in determining the admissibility of identification testimony." *Brathwaite*, 432 U.S. at 114. Petitioner's claim is much narrower. He contends that, in deciding whether the identification was reliable, trial courts should be prohibited from considering "the level of certainty demonstrated by the witness." *Biggers*, 409 U.S. at 199. But certainty is not the only, or even the primary, basis for a finding of reliability; it is one of five

factors identified by the Court, and the list is not exhaustive. See *Brathwaite*, 432 U.S. at 114 (factors "include" five identified by Court); *Biggers*, 409 U.S. at 199 (same). As explained below, there is no justification for the Court to make the modification urged by petitioner to the totality-of-the-circumstances test for deciding the reliability of an identification, and thereby to overrule *Biggers* and *Brathwaite* in part.

Contrary to petitioner's assertion, the witness's level of certainty has not been "conclusively shown" to have "little or no correlation with the accuracy of th[e] identification" (Pet. 3), and there is no "scientific consensus" (Pet. 5)—much less an "overwhelming" one (*ibid.*)—that supports his proposed rule. As the Supreme Court of Connecticut observed only a few months ago, the "scientific studies" on the correlation between a witness's confidence and the accuracy of his identification "are not definitive." *State* v. *Ledbetter*, 881 A.2d 290, 313 (2005). Accordingly, as the Supreme Judicial Court of Massachusetts observed only a few weeks ago, "there does not appear to be a consensus within the psychological community that 'no' relationship exists." *Commonwealth* v. *Cruz*, 839 N.E.2d 324, 331 (2005). Indeed, a number of studies, including some of the more recent ones on which petitioner relies, "show[] a positive correlation" between confidence and accuracy. *Ledbetter*, 881 A.2d at 313.[*]

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[*] See, *e.g.*, Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 Ann. Rev. Psychol. 277, 283 (2003) ("Although any given experiment might show a statistically nonsignificant relation between certainty and accuracy, meta-analyses of the literature show a reliable correlation."); Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 Law & Hum. Behav. 603, 622 (1998) ("the most exhaustive review to date" suggests that "witnesses who are highly confident in their

Those findings do not support petitioner's basic assertion that witness certainty is "not relevant" (Pet. 10) to the reliability of identification evidence. Cf. Fed. R. Evid. 401 ("relevant" evidence is evidence having any tendency to make the existence of a material fact "more probable" than it would be without the evidence).

Petitioner acknowledges that "some studies have found a statistically significant correlation between witness certainty and accuracy," but contends that "these studies have found such a relationship only by controlling factors that it is impossible or wholly infeasible to control in the real world." Pet. 6. That is not correct. The studies suggest only that "the correlation may be stronger for witnesses who identify a subject during the identification procedure than for those who determine that the perpetrator is not present." *Ledbetter*, 881 A.2d at 313. See Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 Ann. Rev. Psychol. 277, 283 (2003). And because it is only when a witness identifies a subject that the issue in this case will arise, the confidence-accuracy correlation for "witnesses who made a positive identification" is the "appropriate index." Siegfried Ludwig Sporer et al., *Choosing, Confidence, and Accuracy: A Meta-Analysis of the Confidence-Accuracy Relation in Eyewitness Identification Studies*, 118 Psychol. Bull. 315, 316 (1995).

According to petitioner, "research has shown that the certainty of a witness is easily manipulated by a variety

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identifications are somewhat more likely to be correct as compared to witnesses who display little confidence"). See also Connie Mayer, *Due Process Challenges to Eyewitness Identification Based on Pretrial Photographic Arrays*, 13 Pace L. Rev. 815, 852-853 (1994) ("[a] few studies show that confidence level is a valid predictor of identification accuracy").

of factors that have nothing to do with accuracy," such as "confirming feedback" from law enforcement officers. Pet. 7. Even if true, that is not a reason to adopt petitioner's categorical rule. If, in a particular case, a witness's confidence in the identification has in fact been "manipulated," it might be appropriate for the district court to give the level of certainty little or no weight under the totality of the circumstances. But there is no claim in this case that Lopez's confidence in his identification was "manipulated." Indeed, Special Agent Matta's testimony at the *Wade* hearing confirms that it was not. See 1/27/03 Tr. 28 ("Q. * * * [D]id you do anything to verify, confirm, dissuade him, congratulate him on his selection? A. No, I [did] not."); *id.* at 108 ("Q. * * * [Y]ou didn't encourage him, reward him, do anything to confirm his choice, you wanted it to be an act of his own free will; fair enough? A. Yes.").

Petitioner also relies on research showing that jurors place "disproportionate weight on the confidence of the witness" in deciding whether the identification of the witness was accurate—and, at least when identification is a central issue in the case, in deciding the ultimate question whether the defendant is guilty. Pet. 8. It is not clear that that is correct. As one of the articles on which petitioner relies reports, "survey data indicate that people believe all five criteria are important determinants of identification accuracy," and "certainty is actually ranked as *less* important than each of the four other criteria." Amy L. Bradfield & Gary L. Wells, *The Perceived Validity of Eyewitness Identification Testimony: A Test of the Five* Biggers *Criteria*, 24 Law & Hum. Behav. 581, 591 (2000). In any event, petitioner does not contend that *trial courts* routinely place disproportionate weight on the witness's confidence in making

the threshold determination of whether identification evidence should be *admitted*, and there is no reason to believe that they do. Certainly the district court in this case did not. On the contrary, it appears that the court placed the heaviest weight on Lopez's "significant opportunity to view" petitioner. Pet. App. 16a, 19a.

Even if petitioner could demonstrate the merit of his proposed rule were the issue being considered as a matter of first impression, such a showing would be insufficient here. As petitioner concedes (Pet. 18-20), adoption of the rule he advocates would require the Court to overrule *Biggers* and *Brathwaite* in part, and even in constitutional cases, the doctrine of *stare decisis* "carries such persuasive force" that this Court has "always required a departure from precedent to be supported by some special justification." *Dickerson* v. *United States*, 530 U.S. 428, 443 (2000) (internal quotation marks omitted). Accord, *e.g.*, *Harris* v. *United States*, 536 U.S. 545, 557 (2002) (opinion of Kennedy, J.); *United States* v. *IBM Corp.*, 517 U.S. 843, 856 (1996). Because the "psychological research" on which petitioner relies (Pet. 19) does not unequivocally support his proposed rule, he falls far short of demonstrating the requisite "special justification" for overruling in part two of this Court's precedents.

2. Nor is certiorari warranted on the ground that there is a division of authority in the lower courts, for there is none. While they are of course bound by this Court's interpretation of the federal Constitution, lower courts occasionally issue decisions holding that the empirical basis for a constitutional rule adopted by this Court has been shown to be incorrect. See, *e.g.*, *Roper* v. *Simmons*, 125 S. Ct. 1183, 1189 (2005) (lower court held that, since this Court's decision in *Stanford* v. *Ken-*

*tucky*, 492 U.S. 361 (1989), holding that Constitution does not bar capital punishment for juvenile offenders, "a national consensus ha[d] developed" against that practice) (quoting *State ex rel. Simmons* v. *Roper*, 112 S.W.3d 397, 399 (Mo. 2003) (en banc), aff'd, 543 U.S. 551 (2005)). Petitioner cites no decision in which any court has held that, in light of the current state of scientific knowledge (or for any other reason), the Due Process Clause of the Fifth or Fourteenth Amendment prohibits a trial court from considering the witness's level of certainty in deciding whether an out-of-court identification is independently reliable, such that the out-of-court identification may be admitted (or an in-court identification may be made by the witness). Of the several state-court decisions cited by petitioner (Pet. 12-16), only one, *Ramirez*, 817 P.2d 774 (Utah 1991), adopted the rule that petitioner advocates, and that decision rested on state law, see *id.* at 780-781. The other decisions either addressed the issue of instructions to the jury on identification evidence, see *Ledbetter*, 881 A.2d at 316-319; *Brodes* v. *State*, 614 S.E.2d 766, 767-771 (Ga. 2005); *Commonwealth* v. *Santoli*, 680 N.E.2d 1116, 1121 (Mass. 1997); *State* v. *Long*, 721 P.2d 483, 487-495 (Utah 1986), or adopted, as a matter of state law, a rule of admissibility that differs from the one that this Court adopted in *Biggers* and reaffirmed in *Brathwaite*, see *State* v. *Dubose*, 699 N.W.2d 582 (Wis. 2005) (suggestive show-up identification requires exclusion unless procedure was necessary); *Commonwealth* v. *Johnson*, 650 N.E.2d 1257 (Mass. 1995) (suggestive show-up identification always requires exclusion).

3. Review should also be denied because petitioner's claim was not adequately presented to, and was not passed upon by, the court of appeals. "Where issues are

neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) (quoting *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)). Accord, *e.g.*, *Pasquantino* v. *United States*, 125 S. Ct. 1766, 1781 n.14 (2005); *Lopez* v. *Davis*, 531 U.S. 230, 244 n.6 (2001). There is no basis for an exception to that rule here.

In his opening brief in the court of appeals, petitioner conceded that the district court had "properly considered the five 'reliability' factors set out by the Supreme Court in *Neil* [v. *Biggers*] and *Manson* [v. *Brathwaite*]," including "the level of certainty expressed by the witness." Pet. C.A. Br. 43-44. His claim was that the district court's "ultimate conclusion of reliability was based on a *misapplication* of these factors." *Id.* at 44 (emphasis added). In asserting that claim, petitioner "d[id] not challenge the district court's finding that, with respect to the fourth *Neil* factor, the certainty of the identification, Lopez expressed no uncertainty when he identified the photo of [petitioner]." *Id.* at 47. Nor did he claim that the district court should not have considered that factor. He merely stated that "the continuing viability of th[e] factor has been called into serious question by the numerous reported DNA exonerations of people who had been convicted, many of capital felonies, based on eyewitness identifications by people who were quite certain, but were nevertheless wrong." *Ibid.*

It was not until he filed his reply brief that petitioner squarely raised the claim that he raises here: that "the five-factor test" described in *Biggers* and *Brathwaite* "for determining reliability and admissibility of suggestive out-of-court identifications" should be "modified in light of currently-available scientific research demon-

strating that there is virtually no correlation between the *certainty* expressed by a witness and the accuracy of the [sic] his/her identification." Pet. C.A. Reply Br. 12. Perhaps because the Second Circuit ordinarily does "not consider an argument raised for the first time in a reply brief," *Evangelista* v. *Ashcroft*, 359 F.3d 145, 156 n.4 (2d Cir. 2004) (quoting *United States* v. *Yousef*, 327 F.3d 56, 115 (2d Cir.), cert. denied, 540 U.S. 933 and 993 (2003)), cert. denied, 125 S. Ct. 1293 (2005), the court of appeals did not consider that claim. Instead, the court addressed only the fact-bound claim that petitioner raised in his opening brief. It explained that the district court had "reasonably determined that though the procedures used in obtaining the identification of [petitioner] were suggestive, the identification by one of his co-conspirators was itself reliable," and held that the district court had therefore not committed "clear error" in applying "the five-part reliability test." Pet. App. 10a.

4. This case is also an unsuitable vehicle for deciding the question presented because adoption of the rule petitioner advocates would have no effect on the outcome. To begin with, there is little doubt that the identification evidence would have been admitted even if the district court had not considered Lopez's level of confidence. Of the other four factors identified in *Biggers* and *Brathwaite*, the district court determined that three weighed in favor of admission. The court found that Lopez's "repeated opportunities to view [petitioner] are strong evidence of independent reliability" (Pet. App. 16a); that Lopez's "degree of attention adds somewhat to the reliability of his identification" (*id.* at 17a); and that "[t]he accuracy of Lopez's description of [petitioner] weighs slightly in favor of a conclusion of independent reliability" (*id.* at 18a). Only the "time lapse

between Lopez's observing [petitioner] and Lopez's selecting his photo from the photo array" was found by the district court to "weigh[] against a finding of independent reliability." *Id.* at 19a. The factor on which the district court appears to have placed the greatest weight in finding the identification reliable, moreover, was not Lopez's level of certainty but his "significant opportunity to view [petitioner]," *id.* at 16a, 19a, based on Lopez's having spent "time with [petitioner] on two consecutive days," *id.* at 16a. There was good reason for the district court to place substantial weight on that factor, because Lopez was not an "eyewitness" in the ordinary sense, but rather was petitioner's co-conspirator.

Even if the evidence would not have been admitted had the district court not considered Lopez's confidence in his identification, there is little doubt that the jury would have reached the same verdict, because there was substantial independent evidence of petitioner's guilt. Both Berrios and Feliciano, who recruited the killers and had known petitioner for some time, testified that petitioner was involved in the murder. Gov't C.A. Br. 61. In addition, Alvarez testified that it was petitioner who had called her apartment in an effort to lure Casiano to the garage before he was killed, and that Casiano had left her a voice-mail message saying that he was going to the garage because petitioner had paged him. *Id.* at 61-62. Indeed, petitioner admitted that he had spoken with Casiano at the garage shortly before the murder. *Id.* at 16, 62. Petitioner also told his girlfriend that he would be going to jail, or would be killed, because of what had happened to Casiano. *Id.* at 16.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 05-596

IN THE

# Supreme Court of the United States

JOSE ANTONIO PEREZ,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## BRIEF OF THE INNOCENCE NETWORK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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## TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* ..... 1

SUMMARY OF ARGUMENT ..... 2

I. The *Biggers* Test Fails to Detect Unreliable Eyewitness Evidence and Does Not Effectively Protect Due Process ..... 3

A. The *Biggers* Factors Were Originally Based on Assumptions About Eyewitness Accuracy Drawn from the Common Law, Rather Than Empirical Data or Scientific Principles ..... 3

B. Courts and Legal Scholars Have Condemned *Biggers* as an Unsound Analysis of Eyewitness Accuracy and Have Accordingly Sought to Develop Judicial Remedies to Safeguard Due Process ..... 5

1. Based on Existing Empirical Data, State Courts Have Sought to Eliminate the Certainty Factor from the Analysis ..... 6

2. Courts Have Also Used Cautionary Instructions in an Effort to Mitigate the Risk of Mistaken Eyewitness Testimony Admitted Under *Biggers* ..... 8

C. The *Biggers* Factors Do Not Reliably Predict the Accuracy of Eyewitness Identifications ..... 9

1. Witness's Level of Certainty ..... 10

2. Witness's Opportunity to View the Criminal at the Time of the Crime ..... 12

3. Witness's Degree of Attention ..... 13

4. Accuracy of the Prior Description ..... 14

D. The *Biggers* Test Is Not Immune from the Taint of Suggestive Identification Procedures ..... 14

II. The Overwhelming Majority of Wrongful Convictions Have Been Premised on Erroneous Eyewitness Identifications ..... 16

A. Exoneration Data Studies Confirm that Eyewitness Misidentification Is the Most Prevalent Cause of Wrongful Convictions ..... 16

B. The Need for Revision Is Underscored by the Stories of Innocent Individuals Wrongly Convicted under *Biggers* ..... 17

1. Carlos Lavernia, Served Fifteen Years ..... 18

2. Mark Reid, Served Six Years ..... 18

3. Steven Toney, Served Thirteen Years ..... 19

CONCLUSION ..... 20

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

*Atkins v. Virginia*,
536 U.S. 304 (2002) ..... 8
*Brodes v. State*,
614 S.E.2d 766 (Ga. 2005) ..... 5, 7
*Clemons v. United States*,
408 F.2d 1230 (D.C. Cir. 1968) ..... 4
*Coleman v. Alabama*,
399 U.S. 1 (1970) ..... 3
*Commonwealth v. Johnson*,
650 N.E.2d 1257 (Mass. 1995) ..... 5, 6
*Commonwealth v. Santoli*,
680 N.E.2d 1116 (Mass. 1997) ..... 7
*Commonwealth v. Yarris*,
549 A.2d 513 (Pa. 1988) ..... 18
*Cossel v. Miller*,
229 F.3d 649 (7th Cir. 2000) ..... 15
*Davis v. United States*,
512 U.S. 452 (1994) ..... 8
*Foster v. California*,
394 U.S. 440 (1969) ..... 3, 4
*Grutter v. Bollinger*,
539 U.S. 306 (2003) ..... 8
*Jones v. State*,
749 N.E.2d 575 (Ind. Ct. App. 2001) ..... 8
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845 F.2d 493 (5th Cir. 1988) ..... 18
*Manson v. Brathwaite*,
432 U.S. 98 (1977) ..... 2, 3, 4, 11
*McMillan v. Barksdale*,
823 F.2d 981 (6th Cir. 1987) ..... 17
*Neil v. Biggers*,
409 U.S. 188 (1972) ..... 2, 3, 4

*State v. Piszczek*,
1993 WL 106966 (Ohio Ct. App. April 8, 1993) ..... 17
*People v. Anderson*,
205 N.W.2d 461 (Mich. 1973) ..... 4
*People v. Bullock*,
507 N.E.2d 44 (Ill. App. Ct. 1987) ..... 17
*People v. Callace*,
143 A.D.2d 1027 (N.Y. App. Div. 1988) ..... 17
*People v. Chalmers*,
163 A.D.2d 528 (N.Y. App. Div. 1990) ..... 17
*People v. Jenkins*,
132 A.D.2d 942 (N.Y. App. Div. 1987) ..... 17
*Roper v. Simmons*,
543 U.S. 551, 125 S. Ct. 1183 (2005) ..... 8
*Simmons v. United States*,
390 U.S. 377 (1968) ..... 3, 4
*State v. Bauer*,
683 P.2d 1140 (Mont. 1984) ..... 17
*State v. Bromgard*,
862 P.2d 1140 (Mont. 1993) ..... 17
*State v. Brown*,
1983 WL 6945 (Ohio Ct. App. Sept. 16, 1983) ..... 18
*State v. Charles*,
511 So. 2d 1164 (La. Ct. App. 1987) ..... 17
*State v. Dubose*,
699 N.W.2d 582 (Wisc. 2005) ..... 5, 6
*State v. Jean*,
311 S.E.2d 266 (N.C. 1984) ..... 17
*State v. Ledbetter*,
881 A.2d 290 (Conn. 2005) ..... 5, 6, 7, 9
*State v. Long*,
721 P.2d 483 (Utah 1986) ..... 5, 6, 9
*State v. Ramirez*,
817 P.2d 774 (Utah 1991) ..... 5, 6, 8

*State v. Reid*,
757 A.2d 482 (Conn. 2000) ..... 18, 19
*State v. Smith*,
1988 WL 79080 (Ohio Ct. App. July 28, 1988) ..... 18
*State v. Sutherlin*,
393 N.W.2d 394 (Minn. Ct. App. 1986) ..... 17
*State v. Toney*,
680 S.W.2d 268 (Mo. Ct. App. 1984) ..... 19
*State v. Woodall*,
385 S.E.2d 253 (W. Va. 1989) ..... 18
*Stovall v. Denno*,
388 U.S. 293 (1967) ..... 3
*United States v. Wade*,
388 U.S. 218 (1967) ..... 2, 3, 7
*Watkins v. Sowders*,
449 U.S. 341 (1981) ..... 7, 11
*Webb v. State*,
746 P.2d 203 (Okla. Crim. App. 1987) ..... 18
*Webster v. State*,
474 A.2d 1305 (1984) ..... 17

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Amy L. Bradfield & Gary L. Wells, *The Perceived Validity of Eyewitness Identification Testimony: A Test of the Five Biggers Criteria*, 24 LAW & HUM. BEHAV. 581 (2000) ..... 9, 10, 12

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## INTEREST OF *AMICUS CURIAE*[*]

The Innocence Network ("Network") is an association of thirty member organizations dedicated to providing *pro bono* legal and investigative services to indigent prisoners whose actual innocence may be established by post-conviction evidence.[1] The Network currently represents hundreds of prisoners with innocence claims in all fifty States and the District of Columbia. The Network also seeks to prevent future wrongful convictions by researching their causes and pursuing legislative and administrative reform initiatives designed to enhance the truth-seeking functions of the criminal justice system.

The vast majority of individuals exonerated by DNA testing were originally convicted based on eyewitness misidentifications. The Network, therefore, has a compelling interest in ensuring that the legal standard governing admissibility of eyewitness identifications is revised to reflect established limitations on eyewitness testimony.

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[*] *Amicus* certifies that this brief was written by undersigned counsel and that no counsel for a party authored any portion or made any monetary contribution to its preparation or submission. Letters reflecting the written consent of the parties to the filing of this brief have been lodged with the Clerk of the Court.

[1] The Network's U.S. member organizations include: Arizona Justice Project; California/Hawaii Innocence Project; Center on Wrongful Convictions; Cooley Innocence Project; Florida Innocence Initiative; Georgia Innocence Project; Idaho Innocence Project; Innocence Institute at Point Park University; The Innocence Project, Inc.; Innocence Project Indiana; Innocence Project Midwest; Innocence Project of Minnesota; Innocence Project Northwest; Iowa/Nebraska Innocence Project; Innocence Project New Orleans; Medill Innocence Project; Mid Atlantic Innocence Project; New England Innocence Project; North Carolina Center on Actual Innocence; Northern Arizona Justice Project; Northern California Innocence Project; Ohio Innocence Project; Pace Post-Conviction Project; Rocky Mountain Innocence Project; Second Look Program; Texas Innocence Network; Texas Center for Actual Innocence; and Wisconsin Innocence Project.

## SUMMARY OF ARGUMENT

This Court has long acknowledged the infirmities of eyewitness testimony. *See United States v. Wade*, 388 U.S. 218, 228 (1967) (the "vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification"). In *Neil v. Biggers*, 409 U.S. 188 (1972), the Court held that an eyewitness identification made pursuant to an unnecessarily suggestive identification procedure could nonetheless be admissible on the basis of its independent reliability. *Id.* at 199-200. In so doing, the Court fashioned a five-factor "totality of the circumstances" test for determining eyewitness reliability that evaluates (1) the witness's opportunity to view the criminal at the time of the crime; (2) his or her degree of attention; (3) the accuracy of the prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the length of time between the crime and the identification. *Id.* Notably, however, the *Biggers* factors, which this Court confirmed in *Manson v. Brathwaite*, 432 U.S. 98 (1977), were never grounded upon any available scientific evidence, but rather appear to be based on commonly held assumptions regarding eyewitness testimony.

Since *Biggers*, a substantial body of empirical research has seriously undermined the test's continued validity, particularly the factor weighing a witness's level of certainty, which is paradoxically the least reliable factor and yet the one accorded most weight by juries. Indeed, researchers and commentators have widely condemned various *Biggers* factors as unreliable predictors of eyewitness identification accuracy. In view of this compelling scientific data, the Court should now revise the *Biggers* test to enable courts to effectively distinguish between accurate and inaccurate eyewitness identifications. Accordingly, the Innocence Network, as *amicus curiae*, respectfully requests that the Court grant a writ of certiorari to the United States Court of Appeals for the Second Circuit in this case.

## I. The *Biggers* Test Fails to Detect Unreliable Eyewitness Evidence and Does Not Effectively Protect Due Process

### A. The *Biggers* Factors Were Originally Based on Assumptions About Eyewitness Accuracy Drawn from the Common Law, Rather Than Empirical Data or Scientific Principles

The Court's jurisprudence leading up to *Biggers* and *Brathwaite* stemmed from well-founded due process concerns that eyewitness identifications are unreliable, and that suggestively obtained identifications were a "major factor contributing to the high incidence of miscarriage of justice." *Wade*, 388 U.S. at 228. Prior to *Biggers*, the Court grappled with due process questions arising from eyewitness identifications obtained from various types of suggestive identification procedures. *See, e.g.*, *Stovall v. Denno*, 388 U.S. 293 (1967); *Simmons v. United States*, 390 U.S. 377 (1968); *Foster v. California*, 394 U.S. 440 (1969); *Coleman v. Alabama*, 399 U.S. 1 (1970). *Biggers* sought to harmonize the Court's decisions regarding suggestive identification procedures by holding that "[i]t is the likelihood of misidentification which violates a defendant's right to due process." 409 U.S. at 198. The "central question" was "whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive." *Id.* at 199. The Court's subsequent decision in *Brathwaite*, likewise held that "reliability is the linchpin in determining the admissibility of identification testimony" and that "[t]he factors to be considered are set out in *Biggers*." 432 U.S. at 114.

Remarkably, in articulating the Court's test, neither *Biggers* nor *Brathwaite* relied on any existing empirical evidence regarding the unreliability of eyewitness testimony. *See id.* at 125-26 ("Neither *Biggers* nor the Court's opinion today points to any cor[illegible] empirical evidence. Studies since *Wade* have onl[illegible]einforced the validity of its assessment of the dan[illegible]s of identification testimony.")